

Memorandum 2004-13

**Civil Discovery: Nonsubstantive Reform
(Insurance Code Section 11580.2)**

In September 2003, the Commission approved a recommendation proposing nonsubstantive reorganization of the civil discovery provisions, to make them more user-friendly and facilitate sound development of the law. The recommendation includes conforming revisions to a number of statutes, including Insurance Code Section 11580.2.

In preparing the recommendation for printing and submission to the Legislature, the staff became aware of issues relating to that provision that need to be brought to the Commission's attention. The issues are discussed below.

The staff believes that the provision should be removed from the recommendation for further study by the Commission.

INSURANCE CODE SECTION 11580.2

Insurance Code Section 11580.2 is a lengthy provision pertaining to uninsured and underinsured motorist coverage in California. Under subdivision (a), with some limitations a bodily injury liability insurance policy covering liability arising out of ownership, maintenance, or use of a motor vehicle must include a minimum amount of uninsured and underinsured motorist coverage. Under subdivision (f), the policy providing such coverage "shall provide that the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration." In other words, if a dispute arises between an insured and an insurer regarding whether the insurer is liable under the policy terms providing uninsured and underinsured motorist coverage, and the disputants cannot agree on how to resolve the dispute, arbitration of the dispute pursuant to the policy is mandatory.

Subdivision (f) further provides:

The arbitration shall be deemed to be a proceeding and the hearing before the arbitrator shall be deemed to be the trial of an issue therein for purposes of issuance of a subpoena by an attorney of a party to the arbitration under Section 1985 of the Code of Civil Procedure. **Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure** shall be applicable to these determinations, and all rights, remedies, obligations, liabilities and procedures set forth in **Article 3** shall be available to both the insured and the insurer at any time after the accident, both before and after the commencement of arbitration, if any, with the following limitations:

(1) Whenever in **Article 3**, reference is made to the court in which the action is pending, or provision is made for application to the court or obtaining leave of court or approval by the court, the court that shall have jurisdiction for the purposes of this section shall be the superior court of the State of California, in and for any county that is a proper county for the filing of a suit for bodily injury arising out of the accident, against the uninsured motorist, or any county specified in the policy or an endorsement added thereto as a proper county for arbitration or action thereon.

(2) Any proper court to which application is first made by either the insured or the insurer under **Article 3** for any discovery or other relief or remedy, shall thereafter be the only court to which either of the parties shall make any applications under **Article 3** with respect to the same accident, subject, however, to the right of the court to grant a change of venue after a hearing upon notice, upon any of the grounds upon which change of venue might be granted in an action filed in the superior court.

(3) A deposition pursuant to **Section 2016 of the Code of Civil Procedure** may be taken without leave of court, except that leave of court, granted with or without notice and for good cause shown, must be obtained if the notice of the taking of the deposition is served by either party within 20 days after the accident.

(4) **Paragraph (4) of subdivision (a) of Section 2019 of the Code of Civil Procedure** is not applicable to discovery under this section.

(5) For the purposes of discovery under this section, the insured and the insurer shall each be deemed to be "a party to the record of any civil action or proceedings," where that phrase is used in **paragraph (2) of subdivision (b) of Section 2019 of the Code of Civil Procedure**.

(6) Interrogatories under **Section 2030 of the Code of Civil Procedure** and requests for admission under **Section 2033 of the Code of Civil Procedure** may be served by either the insured or the insurer upon the other at any time more than 20 days after the accident without leave of court.

(7) Nothing in this section limits the rights of any party to discovery in any action pending or that may hereafter be pending in any court.

The cross-references shown in bold need to be conformed if the Commission's proposal to reorganize the civil discovery provisions is enacted.

The cross-references in subdivision (f) predate the Civil Discovery Act of 1986. Conforming revisions were not made to subdivision (f) when the Civil Discovery Act was enacted.

Cross-references to Article 3

Some of the cross-references in Insurance Code Section 11580.2(f) are to "Article 3" (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure. Those cross-references did not need to be conformed when the Civil Discovery Act of 1986 was enacted, because the previous civil discovery statute was also codified as Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure. See 1986 Cal. Stat. ch. 1334, § 1.

But the cross-references to Article 3 will have to be revised if the Commission's proposed nonsubstantive reorganization is enacted. Under that proposal, the civil discovery provisions would be relocated to Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. Thus, the Commission's proposed amendment of Insurance Code Section 11580.2 would replace each reference to Article 3 with a reference to that title. There are no issues concerning these conforming revisions.

Cross-reference to Code of Civil Procedure Section 2019(b)(2)

Insurance Code Section 11580.2(f)(5) provides:

(5) For the purposes of discovery under this section, the insured and the insurer shall each be deemed to be **"a party to the record of any civil action or proceedings,"** where that phrase is used in paragraph (2) of subdivision (b) of Section 2019 of the Code of Civil Procedure.

(Emphasis added.) That provision is difficult to understand, because Code of Civil Procedure Section 2019(b) does not contain the phrase "a party to the record of any civil action or proceedings."

The language that now appears in subdivision (f)(5) was added to Insurance Code Section 11580.2 in 1963. 1963 Cal. Stat. ch. 1750, § 1 (see subd. (e)(5)). At the time, Code of Civil Procedure Section 2019(b) pertained to the location of a deposition and referred to “a party to the record of any civil action or proceedings.” It stated:

(2) Notwithstanding Section 1989, the court may, upon motion on 10 days’ written notice and for good cause shown, make an order requiring a deponent who is a **party to the record of any civil action or proceeding** or is a person for whose immediate benefit said action is prosecuted or defended or is at the time of the taking of the deposition an officer, director or managing agent of any such party or person to attend a deposition at a place more than 150 miles from the residence of such deponent. In granting or refusing such order, the court shall consider whether the moving party selected the forum, whether the deponent will be present at the trial, the convenience of the deponent, the suitability of discovery through a deposition by written interrogatories or other discovery methods, the number of depositions sought under this section, the expense to the parties of requiring the deposition to be taken within 150 miles of the residence of the deponent, the whereabouts of the deponent at the time the deposition is scheduled to be taken, and all other factors tending to show whether or not the interests of justice and the convenience of the parties and witnesses will be served by requiring the deponent to appear for his deposition at a place more than 150 miles from his residence. Such order may provide that the party desiring to take such deposition shall pay the reasonable expenses incurred by the deponent in attending such deposition and that he furnish an undertaking approved by the court to secure such payment and may contain such other terms and conditions as are equitable and just.

1961 Cal. Stat. ch. 192, § 2 (emphasis added). Under that provision, “a party to the record of any civil action or proceedings” could under certain circumstances be deposed at a place more than 150 miles from the deponent’s residence.

The apparent purpose of the language now in Insurance Code Section 11580.2(f)(5) was to make clear that although a contractual arbitration mandated by Section 11580.2 was technically not a “civil action or proceeding,” the insured and the insurer must each be considered “a party to the record of any civil action or proceedings” for purposes of determining where they could be deposed under former Code of Civil Procedure Section 2019(b).

Former Code of Civil Procedure Section 2019 was repealed by the Civil Discovery Act of 1986. 1986 Cal. Stat. ch. 1334, § 1. At the time of its repeal, Section 2019 was identical to the provision quoted above, except gender neutral. See 1982 Cal. Stat. ch. 192, § 1.

The new provision governing the location of a deposition was not new Code of Civil Procedure Section 2019(b), but new Code of Civil Procedure Section 2025(e). Neither of those new provisions included the phrase “a party to the record of any civil action or proceedings.” 1986 Cal. Stat. ch. 1334, § 2. Insurance Code Section 11580.2(f)(5) has never been amended to reflect that change.

The Commission pointed this out in its tentative recommendation on nonsubstantive reorganization of the civil discovery statute and solicited comment on how to conform Insurance Code Section 11580.2(f)(5). Tentative Recommendation on *Civil Discovery: Nonsubstantive Reform* (Feb. 2003), pp. 124-26; Tentative Recommendation on *Civil Discovery: Nonsubstantive Reform (Conforming Revisions)* (Feb. 2003), pp. 48-58. The tentative recommendation proposed to replace the confusing reference to Code of Civil Procedure Section 2019(b) with a reference to the proposed new provision that would continue the substance of existing Code of Civil Procedure Section 2019(b) (i.e., proposed Code Civ. Proc. § 2019.030(a)(2)). The Commission acknowledged that this would “continue the present state of confusion” and ideally “the confusing reference should be corrected or eliminated.” The Commission sought input on what should be done.

The only input that the Commission received on this point was from the Consumer Attorneys of California (“CAOC”), which said that “[t]he ‘confusing reference’ should be eliminated.” Memorandum 2003-27, Exhibit p. 3. The staff therefore recommended that Section 11580.2(f)(5) be deleted and the remainder of subdivision (f) renumbered accordingly. Memorandum 2003-7, p. 8. The Commission adopted this recommendation. Minutes (Sept. 2003), p. 16.

On further consideration, the staff considers it necessary to discuss an alternative that was not clearly suggested in the tentative recommendation. Specifically, although the Civil Discovery Act of 1986 made some changes in the rules governing the location of a deposition, and the new provision on that subject (Code Civ. Proc. § 2025(e)) did not include the phrase “a party to the record of any civil action or proceedings,” that provision was and is in many respects similar to former Code of Civil Procedure Section 2019(b). Section 2025(e)(3) currently provides:

(3) A party desiring to take the deposition of a natural person who is a **party to the action** or an officer, director, managing agent, or employee of a **party** may make a motion for an order that the deponent attend for deposition at a place that is more distant than that permitted under paragraph (1). This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion.

In exercising its discretion to grant or deny this motion, the court shall take into consideration any factor tending to show whether the interests of justice will be served by requiring the deponent's attendance at that more distant place, including, but not limited to, the following:

(A) Whether the moving party selected the forum.

(B) Whether the deponent will be present to testify at the trial of the action.

(C) The convenience of the deponent.

(D) The feasibility of conducting the deposition by written questions under Section 2028, or of using a discovery method other than a deposition.

(E) The number of depositions sought to be taken at a place more distant than that permitted under paragraph (1).

(F) The expense to the parties of requiring the deposition to be taken within the distance permitted under paragraph (1).

(G) The whereabouts of the deponent at the time for which the deposition is scheduled.

The order may be conditioned on the advancement by the moving party of the reasonable expenses and costs to the deponent for travel to the place of deposition.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to increase travel limits for a party deponent, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(Emphasis added.) Like former Code of Civil Procedure Section 2019(b), under certain circumstances (very similar to the circumstances identified in former Section 2019(b)) this provision permits the deposition of a party to a lawsuit to be held further away from the deponent's residence than the deposition of a nonparty.

Thus, **rather than simply deleting Insurance Code Section 11580.2(f)(5), an alternative would be to revise that provision along the following lines:**

(5) For the purposes of discovery under this section, the insured and the insurer shall each be deemed to be “a party to the record of any civil action or proceedings action,” where that phrase is used in paragraph (2) of subdivision (b) of Section 2019 Section 2025.260 of the Code of Civil Procedure.

....

Comment. ...Subdivision (f)(5) is amended to reflect revision and relocation of the civil discovery provision referenced in it (former Code Civ. Proc. § 2019(b)(2)), which pertained to the location of a deposition of “a party to the record of any civil action or proceedings.” Former Code of Civil Procedure Section 2019(b)(2) was repealed in 1986 and its substance relocated, with revisions, to Code of Civil Procedure Section 2025(e)(3). 1986 Cal. Stat. ch. 1334, §§ 1,2. Subdivision (f)(5) was not revised at that time to reflect the repeal of former Code of Civil Procedure Section 2019(b) and the relocation and revision of its substance. It is now amended to reflect those changes, as well as nonsubstantive reorganization of the civil discovery provisions, under which Code of Civil Procedure Section 2025(e)(3) is repealed and continued without substantive change in Code of Civil Procedure Section 2025.260.

If revised in this manner, Insurance Code Section 11580.2(f)(5) would serve essentially the same purpose it served when its substance was first added to Section 11580.2. The provision would make clear that although a contractual arbitration mandated by Section 11580.2 may not technically be an “action,” the insured and the insurer must each be considered “a party to the action” for purposes of determining where the insured or the insurer (if the insured or insurer is a natural person), or an officer, director, managing agent, or employee of the insured or the insurer (if the insured or insurer is an organization), can be deposed.

The staff thinks this revision of Insurance Code Section 11580.2(f)(5) probably would be more appropriate than deleting the provision altogether, given the nonsubstantive nature of the Commission’s proposal to reorganize the civil discovery provisions. We should verify that with stakeholders, however, before proceeding with such a revision.

We propose the following manner of proceeding:

- Remove the amendment of Insurance Code Section 11580.2 from the recommendation proposing nonsubstantive reorganization of the civil discovery provisions.
- Wait until the end of the 2003-2004 legislative session to reconsider Insurance Code Section 11580.2.

- If the Commission’s proposed nonsubstantive reorganization has been enacted, circulate a tentative recommendation proposing to revise Insurance Code Section 11580.2(f)(5) as discussed above. If the Commission’s proposed nonsubstantive reorganization has not been enacted, circulate instead a tentative recommendation proposing to revise Insurance Code Section 11580.2(f)(5) to reflect enactment of the Civil Discovery Act of 1986.
- In either case, consider the comments on the tentative recommendation and finalize a proposed amendment of Insurance Code Section 11580.2 in time to incorporate that amendment in 2005 legislation. The Commission is likely to have a discovery bill in 2005 (see Memorandum 2004-11), which could serve as a vehicle for the amendment of Section 11580.2.

While this approach may seem cautious, we believe that caution is warranted. The proposed reorganization of the civil discovery provisions will be difficult to get enacted if interested parties lack confidence that it is truly nonsubstantive. The Commission has taken numerous steps to prevent such concern, including stressing the nonsubstantive nature of the reform in the proposed Comments, the preliminary part of the Commission’s recommendation, and an uncodified provision stating that “[n]othing in this act is intended to substantively change the law of civil discovery.” A misstep regarding a conforming revision could have a significant negative impact on prospects for enactment of the proposal. It therefore seems prudent to take a go-slow approach to the conforming revisions of Insurance Code Section 11580.2. We are particularly convinced of this because, as discussed below, it may be necessary to change the Commission’s approach to subdivision (f)(4) as well as to subdivision (f)(5).

Cross-reference to Code of Civil Procedure Section 2019(a)(4)

Insurance Code Section 11580.2(f)(4) provides:

(4) Paragraph (4) of subdivision (a) of Section 2019 of the Code of Civil Procedure is not applicable to discovery under this section.

The provision references Code of Civil Procedure Section 2019(a)(4), which states:

- (a) Any party may obtain discovery by one or more of the following methods:
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 - (4) Physical and mental examinations.

In the Commission's proposed reorganization of the civil discovery provisions, Code of Civil Procedure Section 2019(a)(4) would be continued without change in Code of Civil Procedure Section 2019.010(d). Thus, the Commission's conforming revision of Insurance Code Section 11580.2(f)(4) would replace the reference to Code of Civil Procedure Section 2019(a)(4) with a reference to proposed Code of Civil Procedure Section 2019.010(d).

It appears, however, that the same problem exists with regard to subdivision (f)(4) of Insurance Code Section 11580.2 as with regard to subdivision (f)(5). The provision was never conformed to reflect enactment of the Civil Discovery Act of 1986.

Like the language that now appears in subdivision (f)(5), the language that now appears in subdivision (f)(4) was added to Insurance Code Section 11580.2 in 1963. 1963 Cal. Stat. ch. 1750, § 1 (see subd. (e)(4)). At the time, Code of Civil Procedure Section 2019(a)(4) stated:

(4) In the case of depositions of a party to the record of any civil action or proceeding or of any one who at the time of taking the deposition is an officer, director or managing agent of any such party, the service of a subpoena upon any such deponent is not required if proper notice of the taking of such deposition is given to the attorney for such party or to the party, if he has no attorney. In the case of depositions of a person for whose immediate benefit an action or proceeding is prosecuted or defended or of any one who at the time of taking the deposition is an officer, director or managing agent of any such person, the service of a subpoena upon any such deponent is not required if proper notice of the taking of such deposition is given to the attorney of the party prosecuting or defending the action or proceeding for the immediate benefit of the deponent or to such party, if he has no attorney. A notice to take the deposition of a person described in this subdivision (4) cannot require the attendance of such person at a place more than 150 miles from the residence of such person, unless the party desiring to take such deposition first obtains an order pursuant to the provisions of Section 2019(b)(2) of this code.

Under this provision, a party to the record of any civil action or proceeding or an officer, director, or managing agent of such a party could be compelled to attend a deposition without service of a subpoena, so long as the deponent was given notice of the deposition. The apparent purpose of the language that now appears in Insurance Code Section 11580(f)(4) was to make clear that this special rule *did not* apply to a contractual arbitration mandated by Section 11580.2.

Former Code of Civil Procedure Section 2019(a)(4) was repealed by the Civil Discovery Act of 1986 and its substance relocated, with revisions, in Code of Civil Procedure Section 2025(h)(1). 1986 Cal. Stat. ch. 1334, §§ 1, 2. Code of Civil Procedure Section 2025(h)(1) now provides:

(1) The service of a deposition notice under subdivision (c) is effective to require any deponent who is a party to the action or an officer, director, managing agent, or employee of a party to attend and to testify, as well as to produce any document or tangible thing for inspection and copying.

Thus, instead of revising Insurance Code Section 11580.2(f)(4) to refer to proposed Code of Civil Procedure Section 2019.010(d), **it appears more appropriate to revise that provision to refer to proposed Code of Civil Procedure Section 2025.280(a)**, which would continue existing Code of Civil Procedure Section 2025(h)(1) without substantive change. As best we can tell, the effect of such a revision would be to continue the rule that in a contractual arbitration mandated by Section 11580.2, a deposition subpoena is necessary even for a deposition of the insured or the insurer.

We wonder, however, whether this would make sense from a substantive standpoint. We do not know much about the arbitrations mandated by Section 11580.2, but the reason for requiring a deposition subpoena of the insured and the insurer in this context is not immediately obvious to us. Absent some explanation, it seems appropriate to inquire into this. That is another reason to remove the proposed amendment of Insurance Code Section 11580.2 from the recommendation on nonsubstantive reorganization and to solicit further input.

Cross-reference to Code of Civil Procedure Section 2016

Insurance Code Section 11580.2(f)(3) states:

(3) A deposition pursuant to Section 2016 of the Code of Civil Procedure may be taken without leave of court, except that leave of court, granted with or without notice and for good cause shown, must be obtained if the notice of the taking of the deposition is served by either party within 20 days after the accident.

Although the provision refers to a deposition “pursuant to Section 2016 of the Code of Civil Procedure,” Section 2016 has nothing to do with deposition procedure. Rather, Section 2016 provides:

(a) This article may be cited as the Civil Discovery Act of 1986.

(b) As used in this article:

(1) "Action" includes a civil action and a special proceeding of a civil nature.

(2) "Court" means the trial court in which the action is pending, unless otherwise specified.

(3) "Document" and "writing" mean a writing as defined in Section 250 of the Evidence Code.

(c) This article applies to discovery in aid of enforcement of a money judgment only to the extent provided in Article 1 (commencing with Section 708.010) of Chapter 6 of Title 9 of Part 2.

When the language that now appears in subdivision (f)(3) was added to Insurance Code Section 11580.2 in 1963, Code of Civil Procedure Section 2016 did pertain to deposition procedure. 1963 Cal. Stat. ch. 1750, § 1 (see subd. (e)(3)); 1961 Cal. Stat. ch. 2067, § 1. But former Code of Civil Procedure Section 2016 was repealed by the Civil Discovery Act of 1986 and no conforming revision of subdivision (f)(3) was made. 1986 Cal. Stat. ch. 1334, § 1.

The current provision governing deposition procedure is Code of Civil Procedure Section 2025. In the Commission's proposed nonsubstantive reorganization, the substance that provision would become Chapter 9 (commencing with Section 2025.010) of Title 4 of Part 4 of the Code of Civil Procedure.

Thus, Insurance Code Section 11580.2(f)(3) should be revised to refer to Chapter 9 (commencing with Section 2025.010) of Title 4 of Part 4 of the Code of Civil Procedure. The Commission's recommendation already takes that approach. No change in approach appears necessary, but the Commission should not proceed with the proposed revision of subdivision (f)(3) until it has resolved all of the issues relating to subdivision (f).

Cross-references to Code of Civil Procedure Sections 2030 and 2033

Insurance Code Section 11580.2(f)(6) refers to Code of Civil Procedure Sections 2030 (relating to interrogatories) and 2033 (relating to requests for admission):

(6) Interrogatories under Section 2030 of the Code of Civil Procedure and requests for admission under Section 2033 of the Code of Civil Procedure may be served by either the insured or the insurer upon the other at any time more than 20 days after the accident without leave of court.

No conforming revision of subdivision (f)(6) was necessary when the Civil Discovery Act of 1986 was enacted, because that Act repealed and replaced, but did not change the location of, the statutory provisions relating to interrogatories and requests for admission. 1986 Cal. Stat. ch. 1334, §§ 1, 2.

In the Commission's proposed nonsubstantive reorganization, the rules pertaining to interrogatories would be recodified as Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4 of the Code of Civil Procedure. The rules pertaining to requests for admission would be recodified as Chapter 16 (commencing with Section 2033.010) of Title 4 of Part 4 of the Code of Civil Procedure.

Thus, Insurance Code Section 11580.2(f)(6) should be revised to refer to Chapters 13 (commencing with Section 2030.010) and 16 (commencing with Section 2033.010) of Title 4 of Part 4 of the Code of Civil Procedure. The Commission's recommendation already takes that approach. No change in approach appears necessary, but the Commission should not proceed with the proposed revision of subdivision (f)(3) until it has resolved all of the issues relating to subdivision (f).

Bottom Line

In summary, the Commission needs to devote further attention to Insurance Code Section 11580.2 before deciding how that provision should be amended. The staff would remove the provision from the recommendation on *Civil Discovery: Nonsubstantive Reform* and revisit the matter when the fate of that proposal is clear.

Respectfully submitted,

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